10500 General Compliance Principles and Procedures

10500.1 Overview: For every violation of the National Labor Relations Act, there is an appropriate remedy. In Board proceedings, the term ''compliance'' refers to the effectuation of remedial provisions of a settlement agreement, Board order, or court judgment enforcing a Board order.

10500.2 Regional Office Compliance Responsibilities: The effectiveness of the Agency depends in large part on securing prompt and complete compliance with settlement agreements and Board orders. Effectuation of compliance is the responsibility of the Regional Office, acting as agent for the Board. In the course of unfair labor practice proceedings, the following are among the compliance actions that must be undertaken:

a. Assessing appropriate remedies and liabilities at the time the Region finds merit to an unfair labor practice charge.

b. Maintaining contact with discriminatees and other parties during the course of unfair labor practice proceedings.

c. Analyzing actions required to constitute compliance.

d. Monitoring and assessing a respondent's financial ability to comply.

e. Negotiating settlement of disputed compliance issues.

f. Securing and monitoring actual compliance.

g. Reporting on the status of compliance.

h. Recommending further compliance proceedings when necessary.

i. Participating in formal compliance proceedings.

10500.3 Compliance Officer Defined: The term ''compliance officer'' refers to the Regional Office person so designated, and may be a supervisory compliance officer, compliance officer, or any Board agent assigned to compliance functions in a case.

10505 Initiation of Compliance Actions

10505.1 Overview: From the time the Region finds merit to an unfair labor practice charge, compliance actions are appropriate to establish remedies and to secure compliance with them. The compliance officer should respond to inquiries and encourage settlement discussions at any time during unfair labor practice proceedings. The compliance officer should communicate with the parties to an unfair labor practice proceeding in order to initiate compliance actions at the following stages of unfair labor practice proceedings.

10505.2 Upon the Region's Determination of a Violation or Issuance of a Complaint: When the Region determines that a violation has occurred, appropriate remedial action must also be determined, both to support immediate settlement discussions and in anticipation of eventual compliance proceedings.

10505.3 Maintaining Contact with Parties and Discriminatees: The compliance officer should receive a copy of all complaints at the time they issue. At the same time, the compliance officer should receive a list of names and addresses of all alleged discriminatees named in the complaint. The compliance officer is responsible for maintaining contact with discriminatees during the course of unfair labor practice proceedings, for advising them of their responsibilities, and for obtaining information from them that will be needed to determine backpay.

Compliance Manual section 10540.2 sets forth procedures for fulfilling these responsibilities at the time the Region issues a complaint.

10505.4 Monitoring Ability to Comply: At any time in the course of unfair labor practice proceedings, the Region is responsible for monitoring the charged party's ability to comply with anticipated requirements. The compliance officer should be alert to developments that suggest that a charged party will not be able to comply, such as a closing of operations, filing for bankruptcy, or sale of the business. The compliance officer should investigate such issues and make appropriate recommendations.

10505.5 Following an Informal Settlement Agreement: Every informal settlement agreement should clearly specify all remedial actions required. As soon as the Regional Director has approved an informal settlement agreement entered into by all parties, instructions to comply should be sent to the charged party.

See Compliance Manual section 10505.10 regarding procedures for initiating compliance when the charging party does not enter into an informal settlement agreement.

10505.6 Following a Settlement Stipulation: Action to secure compliance with a settlement stipulation should be undertaken when the settlement stipulation has resulted in issuance of a Board order.

10505.7 Following an Administrative Law Judge's Decision: When the General Counsel decides not to file exceptions to an administrative law judge's decision, the compliance officer should immediately obtain the positions of the parties on voluntary compliance. When the charged party commits to compliance and no exceptions are to be filed, compliance proceedings should commence without waiting for issuance of a Board order. Compliance actions taken prior to the Board order, including any period of the notice posting, should be accorded full recognition as compliance with the Board order.

10505.8 Following a Board Order: The compliance officer should initiate compliance action with its remedial provisions as soon as a Board order issues.

10505.9 Following Entry of a Court Judgment: The compliance officer should initiate compliance action immediately on entry of the judgment. If the court only partially enforces the Board order, compliance should ordinarily be sought immediately with respect to the portions enforced.

If the respondent seeks certiorari, compliance efforts should only be deferred until after final disposition by the Supreme Court if there has been a stay of the mandate.[1] A respondent who refuses to comply is subject to contempt proceedings when a stay has not been sought or has been denied.

When certiorari has been sought and there has been a stay of the mandate by the court of appeals, Division of Operations Management clearance should be sought before demanding compliance action.

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[1] *McCurry v. Allen*, 688 F.2d 581, 586 (8th Cir. 1982), citing Stern & Gressman, Supreme Court Practice, at 847 (5th Ed. 1978).

10505.10 Compliance Procedures While Appeals, Exceptions, Motions for Reconsideration, and Supreme Court Review Are Pending: Compliance efforts should not be undertaken during the appeal period of a unilateral settlement agreement, when the Region or charging party is filing exceptions to an unfavorable decision of an administrative law judge, or while a motion for reconsideration of a Board order is pending, without advising the respondent that the final ruling may cause compliance requirements to be altered upward.

10505.11 Following Dismissal of Unfair Labor Practice Proceedings: Compliance proceedings are initiated only to effectuate remedies based on findings of violations of the Act. Thus, whenever an unfair labor practice proceeding leads to dismissal of allegations of unlawful conduct, all compliance actions should cease.

10510 Determining Compliance Requirements

10510.1 Overview: At almost every stage of an unfair labor practice proceeding, the basic responsibility of the compliance officer is to analyze compliance requirements of the case, advise the parties of those requirements, and establish what actions the respondent must undertake to fulfill them.

Compliance proceedings begin with analysis of the actions required by remedial provisions of settlement agreements and Board orders. Every Board order in which a violation of the Act is found contains remedial provisions. Orders almost always contain negative provisions, requiring the respondent to cease and desist from the actions that were found unlawful. Orders often contain affirmative provisions also, requiring the respondent to undertake specific actions either to remedy losses resulting from its unlawful action or to restore conditions to those that existed prior to its unlawful actions.

Informal settlement agreements always contain remedial provisions also, devised to be consistent with Board orders that have been based on the same or similar circumstances and violations.

In many cases, remedial provisions will be self-explanatory, and requirements for their effectuation clear and not subject to dispute. In other cases, requirements will be less clear or disputed by the parties. Determination of backpay is almost always left to compliance proceedings. In these cases, it is the responsibility of the compliance officer to investigate the facts

and circumstances of the case and to apply appropriate policies and Board precedent in order to secure compliance or to recommend further action by the Region.

To investigate remedial requirements, the compliance officer should begin by becoming familiar with the facts of the case to date, including the results of the Region's administrative investigation and the administrative law judge's decision or Board order. The compliance officer will then have to discuss requirements with all parties, advising them of compliance procedures and requirements, eliciting their positions on compliance issues that might be in dispute, and securing information needed to settle or determine disputed issues.

The following sections provide guidelines for the investigation of a range of compliance issues, as well as case citations and current policies to assist in their substantive determination.

10515 Negative Provisions

10515.1 **Overview:** When the Board finds violations of the Act, under Section 10(c) of the Act it will issue an order requiring the respondent to cease and desist from further unlawful actions.

Board orders are subject to judicial enforcement under Section 10(e) of the Act. See Compliance Manual section 10592.3(a) regarding the scope of court judgments enforcing Board orders.

The compliance officer should advise the charging party that it has a responsibility to apprise the Region of any noncompliance with negative provisions. The compliance officer should not be content to wait for charging party reports of noncompliance, but should periodically check with the charging party regarding the status of compliance.

Negative provisions of settlements or Board orders, by their very nature, require refraining from action rather than undertaking action. With the above actions undertaken by the compliance officer, it should be presumed that the respondent is complying with negative provisions, unless there is a complaint of noncompliance.

10520 Affirmative Provisions

10520.1 Overview: Affirmative provisions of settlement agreements and Board orders require respondent action. Examples of affirmative requirements include offering reinstatement, paying backpay, withdrawing recognition from an unlawfully recognized union, and reimbursing employees for dues or initiation fees unlawfully deducted or for hiring hall fees unlawfully exacted. Some affirmative provisions are essentially self-explanatory; others, such as those requiring payment of backpay, almost always require investigation and determination.

Because they require action, affirmative provisions are generally the focus of attention in compliance proceedings. The following sections, through 10555, provide guidelines in determining common affirmative provisions.

10521 Notice Posting: Settlement agreements and Board orders almost always require that the respondent post a remedial notice for 60 days. The purpose of the notice is to inform employees or members of their rights protected by the Act and to set forth publicly the respondent's remedial obligations.

10521.1 Wording Fixed: The wording on the notice is established by the settlement agreement or Board order. Variation or substitution should not ordinarily be permitted in the course of compliance proceedings. Where, however, all parties agree that modification of the wording in the notice is warranted by changed circumstances, the Regional Director is authorized to grant such motion to modify the notice. Where any party is opposed to the proposed modification, the Regional Director should advise the party seeking modification to file its motion with the Board.

10521.2 Location and Number of Notices: General posting provisions require that notices be posted wherever employee or member notices are customarily posted. Examples of posting locations include employee bulletin boards, timeclocks, department entrances, meeting hall entrances, and dues-payment windows. Small facilities may require only one notice; large facilities may require a great number. Specific posting locations will depend on the circumstances of the case, and must be determined by the compliance officer.

10521.3 Preparation of Notices for Posting: The Regional Office should provide notices for posting, with notice text printed on the appropriate blue and white form. The Regional Office is provided with a copy

of notice text with the issuance of an administrative law judge's decision or a Board order. Regional Offices are also supplied with the various blue and white forms that set forth the basis of the posting.

10521.4 Respondent Effectuation of Posting: The respondent must sign and date notices before posting them, and submit two signed and dated copies of the notice to the Regional Office, along with a certification of posting. The certificate of posting must be completed to indicate the date and all locations of posting. In addition to this initial report, the respondent should be asked to report at the end of the posting period that the copies were continuously and conspicuously posted.

10521.5 Posting by a Union: When a union is a respondent, posting provisions generally require that the union return signed and dated notices to the Regional Office to forward to the employer for voluntary posting at the employer's premises. The Regional Office should obtain signed notices and transmit them to the employer.

10521.6 Side Notices: The posting of a side-notice adjacent to a Board notice constitutes noncompliance with the posting provision if the side notice language attempts to minimize the effect of the Board notice or where it suggests that respondent does not subscribe to any of its statements.[2]

10521.7 Routine Notice Checks: The charging party should be advised to bring to the compliance officer's attention any problem associated with proper posting of notices. In addition, it is generally appropriate to make routine checks of posted notices when Board agents are in the neighborhood of the posting site in the course of other business. If it appears that the posting is inadequate, or if improper side notices are present, the compliance officer should seek appropriate corrections.

10521.8 Possible Contempt for Refusal to Post Notices: Before recommending contempt for respondent failure to post a notice, the Region should obtain proof, in the form of an affidavit from an eyewitness, who can be a Board agent, that no notice was posted. In the alternative, a documented admission by the respondent of a failure to post should be provided.

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[2] See, for example, *Bangor Plastics*, 156 NLRB 1165, 1166–1167 (1966), enfd. denied 392 F.2d 772 (6th Cir. 1968); *Bingham-Williamette Co.*, 199 NLRB 1280, 1281–1282 (1972).

10522 Court Costs: United States courts of appeals often award costs to the Agency on enforcement of Board orders. Such costs are generally set forth in the final judgment entered. Regional Offices may obtain copies of judgments from the Agency's Appellate Court Branch if they do not receive them directly in the court's distribution.

Court costs are part of the mandate of the court, and the compliance officer should seek their payment as part of compliance proceedings. Respondents should be asked to submit to the Regional Office checks in payment of costs payable to the National Labor Relations Board. Respondents should also be advised that the case name and number and notation ''court costs'' should be included on the check for identification purposes.

The Regional Office should forward the check, with a cover memorandum identifying the case and the nature of the check, to the Agency's Finance Branch, with a copy to the Division of Enforcement Litigation. The remittance control procedures set forth in OM 92-13 (see Appendix 1 for a copy) should be followed. See also Compliance Manual section 10640.3.

The Division of Enforcement Litigation maintains a record of cases pending the collection of court costs to ensure that those claims by the Government are fully paid or that the collection action is terminated by the head of the Agency as required by the Federal Claims Collection Act of 1966.

The Regional Office should also submit to the Division of Enforcement Litigation a quarterly report on pending cases which require payment of court costs.

10522.1 Settlement or Nonpayment of Court Costs: A respondent may attempt to offer to settle court costs in the same manner in which offers are made to settle backpay claims. Because costs are payable to the United States Government and constitute a claim by the Government, Regional Offices should not accept a settlement offer of court costs. Such offers should instead be referred to the Division of Enforcement Litigation. The Region's submission should set forth the respondent's reasons for not complying fully with its court costs obligation, together with the Region's recommendation whether the respondent's offer should be accepted. If the respondent claims an inability to pay, the Region should investigate that allegation and include its findings in its submission.

Similarly, cases in which Regions are unable to obtain the payment of costs should be referred to the Division of Enforcement Litigation with

a fully supported recommendation whether the collection action for court costs should be terminated.

Compliance Manual section 10600 discusses procedures in investigating a respondent's ability to pay remedial liabilities.

When compliance has otherwise been obtained, cases should not be closed on compliance until costs are paid absent notification from the Division of Enforcement Litigation that the Board has terminated collection action for outstanding costs.

The closed case report should note whether court costs were awarded, the amount of the award, the amount of any check received for court costs, and the date the check was forwarded to the Finance Branch. The remarks section should set forth the date notification was received from the Division of Enforcement Litigation that collection actions were terminated.

10523 Preserve and Make Available Records: When respondent has been ordered to make employees whole, there is usually a corresponding affirmative requirement that respondent make records available that are necessary to analyze the amount of backpay or other monetary remedy due. After preliminary investigation, the compliance officer may need to detail for respondent the nature of records required for the particular case, as respondent may not readily discern on its own the records most appropriate for determining backpay.

Occasionally, administrative law judges or the Board do not affirmatively order the preservation and production of records, even though there is a monetary remedy that warrants such a requirement. In appropriate circumstances, the compliance officer should recommend to the Regional Director that exceptions be taken to a judge's decision or that reconsideration or clarification be sought from the Board to provide for this affirmative requirement so as to avoid the possible need for discovery proceedings at a later stage of the case.

When a respondent refuses to make available records as required under a Board order, experience has shown that contempt proceedings, even summary proceedings, aimed at procuring such records are unduly time consuming and cumbersome. A better approach is for the Region to subpoena the records from the respondent or others pursuant to Section 11 of the

Act, assuming that the person of whom the request is made does not cooperate voluntarily.

For example, an outside payroll service may be a source of earnings information, and may be subject to a subpoena if it does not cooperate voluntarily. The respondent's outside accountants or auditors also may be a good source of such information. See Compliance Manual sections 10590.2 and 10601.2 regarding investigative subpoenas, and applicable clearance requirements.

10523.1 Report to the Regional Director on Compliance Steps Taken: Board orders generally require the respondent to submit to the Regional Director a report of steps taken to comply with other provisions of the Order. Such reports should be requested in the course of compliance actions. Their contents depend upon other circumstances of the case.

10524 Reimbursement for Dues Deducted: When an employer is found to have deducted dues payments unlawfully, reimbursement to employees may be ordered by the Board. Reimbursements due are to be computed with reference to books and records of both employer and union.

10525 Compliance With a 10(k) Determination of Dispute: See Unfair Labor Practice Proceedings Manual section 10214.

10526 Bargaining

10526.1 Overview: In cases where a respondent has violated Section 8(a)(5) or 8(b)(3) of the Act, a standard affirmative provision in a settlement agreement or Board order requires the respondent to bargain collectively, on request, over working conditions covering the employees in a described unit. Other bargaining provisions will address the circumstances of the case, and may require such actions as to meet and bargain, to restore conditions that were unlawfully unilaterally changed, to provide requested information, or to reduce an agreement to writing. Most bargaining cases involve an employer respondent, but bargaining requirements in cases involving either an employer or union are generally equivalent. Some affirmative requirements will be self-explanatory, while others will require investigation and determination.

10526.2 Affirmative Requirements That Require Charging Party Request: Affirmative requirements involving bargaining often require respondent action only on the request of the charging party. When this

is the case, the compliance officer should notify and remind the parties of this qualification in compliance requirements.

For example, a remedial provision of a Board order may require that, on the union's request, a respondent employer must reinstate terms of a collective-bargaining agreement that it unlawfully unilaterally changed when the agreement expired. The union must decide whether to request such a reinstatement and in some circumstances may conclude not to. For example, the parties may have bargained during the course of unfair labor practice proceedings and reached a complete new agreement. Only if the union requests reinstatement of the terms of the expired agreement is the employer required to reinstate them. The Region should not serve as a conduit for such requests; rather, the Region should satisfy itself that such a request has in fact been made.

When a charging party makes the appropriate request, compliance with the provision requires that the action be undertaken, and the compliance officer must evaluate all that is entailed in the action. Where the charging party does not request specified respondent action because it has reached an agreement with the respondent, that agreement may constitute compliance with the provision. Where there is neither an agreement nor a request to undertake a specified action, both parties should be aware that, absent special circumstances, the compliance obligation is continual.

10526.3 Obligations to Recognize, Meet, and Bargain: In cases where the respondent has refused to recognize or meet with the charging party, and affirmative provisions require it to meet and to bargain upon request of the charging party, compliance should be monitored by periodic checks on the status of negotiations. Accurate and complete information about bargaining conferences and interparty communications should be obtained and kept in the Regional Office file. The Region should exercise caution, however, that its function be confined to ensuring that bargaining takes place; it should not encourage specific bargaining positions or otherwise render assistance of a mediatory nature.

10526.4 Bargaining Obligations Monitored for a Reasonable Period of Time: The process of collective bargaining may be prolonged, and compliance with affirmative bargaining provisions may be accomplished only over a period of time. The point at which the compliance officer ceases to monitor bargaining will depend on the circumstances of the case. It is generally appropriate to cease monitoring and to close cases when a new agreement has been reached, when the parties have reached a good-

faith impasse in negotiations for a new agreement, or when the charging party has established that it is no longer interested in pursuing bargaining.

10526.5 Make-Whole Benefit Funds: When a respondent has unlawfully unilaterally discontinued payments to benefit trust funds, it is typically ordered to make retroactive payments to these funds until the parties bargain to a new agreement or reach an impasse.[3] To assess the liabilities to benefit trust funds in such cases, the compliance officer must establish benefit contribution rates, the complement of unit employees, and the backpay period.

For example, a Board order requires retroactive contributions to a health and welfare fund as required under terms of a collective-bargaining agreement. The agreement establishes that the contribution rate is $1.50 for every hour worked. Employer payroll records will establish who the unit employees were and the number of hours they worked during the backpay period. With this information, the full liability will be determined by arithmetic.

Note that in cases involving large numbers of unit employees, spreadsheet programs now available in Regional Offices will greatly facilitate calculation of liabilities.

In cases where respondents have unlawfully ceased making contributions to benefit funds, in addition to requiring retroactive contributions to the funds, affirmative provisions of settlement agreements and Board orders also generally require that employees be made whole for losses resulting from the cessation of contributions. See Compliance Manual sections 10535.2 and 10535.3 for discussion of losses to individual employees resulting from lost health and retirement benefits. See Compliance Manual section 10541.4 for discussion of the treatment of interim health and retirement benefits in determining net employee losses.

Particularly in cases where it has provided an interim benefit, or where employees suffered no individual losses, a respondent may argue that requiring it to make retroactive payment to a benefit trust fund will not benefit unit employees, and will constitute an inappropriate punitive rather than a remedial liability. Affirmative provisions in Board orders are generally clear regarding obligations to make retroactive contributions to benefit trust funds, regardless of respondent benefits provided during the backpay period,

[3] See, for example, *Roman Iron Works*, 292 NLRB 1292 (1989); *Stone Boat Yard*, 264 NLRB 981 (1983), enfd. 715 F.2d 441 (9th Cir. 1983), cert. denied 466 U.S. 937 (1984).

and regardless of whether or not employees suffered losses or are likely to derive immediate benefit from retroactive contributions. However, union and trust funds at times are amenable to compromosing such liabilities. When such situations arise, Regions should follow the provisions of sections 10564.1 and 10564.3 regarding settlements.

10526.6 Disestablishment: Disestablishment contemplates a complete and permanent termination of all relationships between an employer and the affected labor organization, and any successor, having to do with wages, hours, and other working conditions. It does not necessarily mean complete dissolution of the organization although the order may bring about that result. Disestablishment is effected by the employer's written notification to the union, sent to the last known officers, if there is doubt as to present existence, that it withdraws recognition from or will not grant recognition to the union, whichever is appropriate, and disestablishes the union as a bargaining representative for its employees.

The employer must also specifically notify employees that it disestablishes the union and that they are free to join or not to join any other union. It must perform such other affirmative acts as may be required by the order, such as providing instructions to supervisors to withdraw from membership in the union or from participation in the union's affairs.

10527 Reinstatement

10527.1 Overview: When a respondent has unlawfully terminated an employee or taken other action to adversely change terms or conditions of employment, the standard Board remedy is that the employee be offered full reinstatement to the former position or, if that position no longer exists, to a substantially equivalent one, without prejudice to seniority or other rights or privileges previously enjoyed. The underlying remedial principle is that the employee be restored to circumstances that existed prior to the respondent's unlawful action or that would be in effect had there been no unlawful action.

The following Compliance Manual sections address procedures and issues in effectuating reinstatement.

Note that remedial orders also generally require respondents to make whole employees for losses suffered as a result of an unlawful termination or adverse action. Compliance Manual sections 10530–10556 address proce-

dures and issues in determining backpay required to make an employee whole.

Compliance Manual section 10564.8 addresses settlement procedures pertaining to reinstatement issues.

10527.2 Reinstatement to Former Position: When the former position is well defined and still exists at the time reinstatement is offered, the respondent should offer the employee reinstatement to that position.[4] Reinstatement is not foreclosed because the position has been filled since the unlawful action or because a replacement employee will have to be displaced in order to effectuate reinstatement. Contentions that reinstatement would be disruptive or adversely affect morale do not serve to foreclose reinstatement.[5]

Full reinstatement also requires restoration of seniority[6] and other privileges,[7] restoring the employee's status to what it would have been had there been no interruption of employment by the unlawful action.

For example, 2 years after an employee has been terminated, a Board order issues requiring that the employee be offered full reinstatement to the employee's former position. Full reinstatement requires not only placement in the employee's former position, but credit for seniority for the 2-year period between the termination and reinstatement.

Restoration of seniority and other privileges can affect future vacation accrual, credit toward retirement, standing in the event of a layoff, and other terms of employment.

Full reinstatement also requires reinstatement at terms that would be in effect at the time of the reinstatement offer had there been no unlawful action, including pay raises and changes in benefits.[8]

If the employee would have been promoted or transferred during the period between the unlawful action and the reinstatement offer, reinstatement should be to the position to which the employee would have been promoted or transferred, at terms applicable to the new position.[9]

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[4] See, for example, *Chase National Bank*, 65 NLRB 827, 829 (1946); and *Panoramic Industries*, 267 NLRB 32, 38–39 (1983).
[5] See, for example, *Fry Products*, 110 NLRB 1000 (1954).
[6] See, for example, *Rainbow Coaches*, 280 NLRB 166, 184 (1986).
[7] See, for example, *Staats and Staats, Inc.*, 254 NLRB 888, 899 (1981).
[8] See, for example, *Kansas Refined Helium Co.*, 252 NLRB 1156, 1159 (1980).
[9] See, for example, *Mooney Aircraft*, 164 NLRB 1102, 1103 (1967).

It is the compliance officer's responsibility to investigate what is required to effectuate full reinstatement and to establish what terms are in effect at the time of reinstatement. The employer's established practices and the experience of other employees in similar jobs should provide a basis for determining full reinstatement requirements.

10527.3 Reinstatement to a Substantially Equivalent Position: In the event that the employee's former position no longer exists at the time reinstatement is offered, the standard reinstatement provision in a Board order requires reinstatement to a substantially equivalent position.[10]

In this situation also, to determine reinstatement requirements it is the compliance officer's responsibility to investigate the circumstances of the elimination of the former position and what treatment the employer would have accorded the employee in the absence of the unlawful action.

10527.4 Reinstatement Rights of Strikers: Employees engaged in strikes have certain reinstatement rights on their unconditional application to return to work.

Unfair labor practice strikers are entitled to full reinstatement on unconditional application, even if the employer must dismiss other employees hired to replace them during the unfair labor practice strike.[11]

Generally, the Board will order the respondent to reinstate unfair labor practice strikers on application and to make them whole for any loss of pay resulting from the failure to reinstate them within 5 days after their application.[12] If the employer rejects, unduly delays, or ignores any unconditional application to return to work, or attaches unlawful conditions to reinstatement, backpay will commence as of the date of the unconditional application to return to work.[13]

An employer's valid offer of reinstatement to some but less than all of a group of unfair labor practice strikers will toll backpay for those to whom the offer is made. They do not lose their rights to reinstatement if they refuse the offer because it was not made to the entire group.[14]

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[10] See, for example, *Chase National Bank*, 65 NLRB 827, 829 (1946).

[11] See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278, and fn. 9 (1956), affg. 214 F.2d 462, 466 (2d Cir. 1954), enfg. 103 NLRB 511, 518–519, 562 (1953).

[12] See, for example, *Drug Package Co.*, 228 NLRB 108, 113–114 (1977), enfd. in part and remanded in part 570 F.2d 1340 (8th Cir. 1978).

[13] See, for example, *Drug Package Co.*, 241 NLRB 330, 332 fn. 13 (1979).

[14] See, for example, *Southwestern Pipe*, 179 NLRB 364, 365 (1969), modified on other grounds 444 F.2d 340 (5th Cir. 1971).

10527.4

Economic strikers are entitled to full reinstatement on unconditional application if their jobs are available or, if such are not available, reinstatement to substantially equivalent positions.[15] Economic strikers are also to be made whole for losses resulting from a refusal or delay in reinstatement.

If, at the time of the economic strikers' application for reinstatement, their jobs are occupied by permanent replacements, the employer need not discharge the replacements to make room for the strikers.[16] Moreover, if vacancies are not available because of substantial business reasons such as a business downturn, the respondent need not immediately reinstate strikers.[17]

Although an employer need not offer immediate reinstatement to economic strikers if no positions are available at the time they offer to return to work, if vacancies later arise, the employer must seek out the strikers and offer them reinstatement, unless they have obtained regular and substantially equivalent employment elsewhere, or unless the employer can show legitimate and substantial business justification for failing to offer such reinstatement.[18]

The requirement of unconditional application can be satisfied by an application by the union, acting as the strikers' agent, on behalf of all strikers; individual applications by the strikers are not necessary.[19] Similarly, an employer's offer of reinstatement to the strikers as a group may be adequate if made to the union representing the strikers.[20]

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[15] See, for example, *Laidlaw Corp.*, 171 NLRB 1366, 1367–1370 (1968), enfd. 414 F.2d 99, 103–106 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[16] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 335 (1938), reaffd. in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). It is the employer's burden to establish that strike replacements are permanent rather than temporary. See *Chicago Tribune Co.*, 304 NLRB 259, 261 (1991) (the employer must show a mutual understanding between itself and the replacements that they are permanent). The determination of the replacement date turns on if and when a commitment to hire an employee for a permanent job was made and accepted, irrespective of when the individual actually starts working or whether the individual has completed any posthire tests or a probationary period. See *Solar Turbines*, 302 NLRB 14 (1991); compare *Harvey Mfg.*, 309 NLRB No. 71 (Nov. 10, 1992).

[17] See, for example, *Robinson Freight Lines*, 129 NLRB 1040, 1041 (1960), enfd. 289 F.2d 937 (6th Cir. 1961); *Oregon Steel Mills*, 291 NLRB 185, 191–192 (1988), enfd. 134 LRRM 2432 (9th Cir. 1989), cert. denied 110 S.Ct. 2617 (1990).

[18] See, for example, *Laidlaw Corp.*, supra; *Harvey Engineering & Mfg. Corp.*, 270 NLRB 1290, 1292 (1984).

[19] See, for example, *Ekco Products Co.*, 117 NLRB 137, 147–148 (1957), and *Colonial Haven Nursing Home*, 218 NLRB 1007, 1011 (1975).

[20] See, for example, *Birmingham Ornamental Iron Co.*, 251 NLRB 814 fn. 1 (1980).

10527.5 Withdrawal From Labor Market No Bar to Reinstatement: A discriminatee's withdrawal from the labor market does not normally terminate the employer's obligation to reinstate.[21]

See Compliance Manual section 10546 regarding actions that constitute unavailability for employment and withdrawal from the labor market. Note that such actions, although not ending the employer's reinstatement obligation, do affect backpay.

10527.6 Reinstatement When a Union is the Respondent: When a union has unlawfully caused an employee to be terminated, it may not be in a position to effectuate reinstatement. Reinstatement provisions in Board orders against union respondents often require specific union actions to seek reinstatement by the employer, such as notifying the employer that it no longer has objections to the employment of the employee.[22]

See Compliance Manual section 10536 regarding backpay when a union is the respondent.

10527.7 Unresolved Reinstatement Issues; Potential Contempt Issues: In those cases when the amount of backpay may depend on whether there has been proper reinstatement, and when an enforced Board order requires reinstatement, the Region should submit the matter to the Contempt Litigation Branch with a recommendation whether contempt proceedings are warranted. The case should be submitted even when there appears to be a legitimate factual or legal controversy surrounding the reinstatement issue. When the facts clearly show insufficient basis for initiating contempt proceedings, telephonic consultation may suffice.

In such cases, the Region should continue to conduct whatever investigation is necessary to compute backpay and to prepare a compliance specification. Unless otherwise instructed by Contempt Litigation Branch, the Region should defer issuance of a compliance specification until the General Counsel has decided to recommend, or the Board has decided whether to authorize, contempt proceedings.

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[21] See, for example, *Deena Artware*, 112 NLRB 371, 376 (1955), enfd. 228 F.2d 871 (6th Cir. 1955).

[22] See, for example, *Sheet Metal Workers Local 355 (Zinsco Electrical Products)*, 254 NLRB 773, 774 (1981).

10528 Exceptions to Reinstatement

10528.1 Overview: Standard reinstatement provisions are clear on their face. There are, however, situations in which reinstatement is not appropriate and is instead foreclosed. When a contention is made that reinstatement is not appropriate, it is the responsibility of the compliance officer to investigate the situation and recommend a Regional determination.

Note that when it is determined that reinstatement is foreclosed, backpay is tolled as of the date it was foreclosed. See Compliance Manual section 10530.1.

The following sections address situations in which reinstatement might be foreclosed.

10528.2 No Positions Available for Reinstatement: If there has been a major reduction in the employee complement, the general reinstatement obligation may be foreclosed if it is established that the employee would have lost his or her position in the course of events in the absence of any unlawful action.

For example, during the course of unfair labor practice proceedings concerning an employee termination, the employer closed its plant, laid off all employees, and went out of business. The Board order ultimately found the termination to have been unlawful, and ordered reinstatement for the employee. The compliance investigation established that the employee would have lost his or her position at the time of the plant closing, and the Region determined that reinstatement was not required in order to comply with the Board order.

In situations when reinstatement is not required because of the elimination of any position to which reinstatement would be appropriate, reinstatement provisions of a Board order still require restoring the employee to conditions that would have applied had there been no unfair action.

For example, if the employee, absent the unlawful action, would have recall rights from a layoff, transfer rights to other employer facilities, or preference in future hiring, appropriate employer action should be required.

In such situations, it may be appropriate for the compliance officer to periodically confirm that the respondent is following recall or preferential hiring policies.

At times, the Board order may provide specifically that an employee be placed on a preferential hiring list.[23]

In cases in which reinstatement is ordered for a number of employees, and there are insufficient positions for all, the same principle of restoring what would have happened should be applied to determine which of the discriminatees should be reinstated to available positions and what arrangements should be made for the rest.

10528.3 Employee Disqualification: An employer may contend that a discriminatee is no longer suitable for a job for such reasons as ill health, lack of skill, new equipment, or change of job content, and that reinstatement should be foreclosed.

In such situations, the compliance officer should investigate the nature of the changed circumstances and the established employer policies and should seek to determine what would have happened to the employee in the absence of any unlawful action. The respondent bears the burden of showing that reinstatement is not appropriate under the circumstances presented. This burden cannot be met with speculation or statements that are not factually supported.[24]

The Board has also found that if the discriminatees' duties were limited by a physical disability before the unlawful action, reinstatement must be to a position suitable to his or her physical limitations.[25]

It may be appropriate to require a trial period at a job in which changes have been made since the unlawful action.[26] If the trial period ends unsatisfactorily for the employee, and a complaint is made that the employee was not given a fair trial, further investigation is warranted to determine whether the employee received support and training equivalent to other similarly situated employees.

Should the compliance officer feel it would be of assistance, he or she should consult with trade school specialists, union officials with long experience in the industry, the Apprenticeship Bureau of the Department of Labor, the state unemployment commission or industrial commission, or similar authorities in the field. Careful investigation by the compliance officer may disclose that the relevant evidence refutes the contentions and that

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[23] See, for example, *Venezia Bread Co.*, 147 NLRB 1048 (1964).
[24] See, for example, *Contemporary Guidance Services*, 300 NLRB 556, 558–560 (1990).
[25] *Lipman Bros.*, 147 NLRB 1342, 1347 (1964), enfd. 355 F.2d 15 (1st Cir. 1966).
[26] See, for example, *Oil Workers (Kansas Refined) v. NLRB*, 547 F.2d 575, 590 (D.C. Cir. 1976).

the employee should be afforded further training or transfer to an available job for which that individual is qualified, as may be necessary.

Even when an employee is determined to no longer be qualified for his or her former position, reinstatement to another position may be required. Such a determination, again, depends on employer policies and the principle that the employee should be treated as though no unlawful action had occurred.

10528.4 Employee Actions That Foreclose Reinstatement: Employee misconduct can foreclose a respondent's reinstatement obligation.[27] Employee actions that result in loss of certification or qualification for a position may also foreclose reinstatement.[28]

For example, if an unlawfully terminated truckdriver lost his driver's license as result of a driving infraction during the course of unfair labor practice proceedings, reinstatement to a driving position may be foreclosed.[29]

In such situations, the respondent bears the burden of establishing that reinstatement is inappropriate. The Board has evaluated employee misconduct in the context of unfair labor practices[30] and underlying respondent motive.[31]

10528.5 Undocumented Aliens: When an employer's obligation to reinstate an employee conflicts with requirements of the Immigration Reform and Control Act of 1986, reinstatement may be foreclosed. See Compliance Manual section 10546.7 for discussion of Agency policies under IRCA as they affect both backpay and reinstatement.

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[27] See, for example, *Clear Pine Mouldings*, 268 NLRB 1044 (1984). See also *John Cuneo, Inc.*, 298 NLRB 856 (1990) (misrepresentations on employment application form).

The reader should note also that on June 14, 1993, the Supreme Court granted certiorari in *ABF Freight System*, v. NLRB, 113 S.Ct. 2959. That case presented the broader issue of whether the Board is precluded from utilizing the traditional remedy of reinstatement with backpay where an employee who has been discriminatorily discharged in violation of the Act was found by an administrative law judge to have given false testimony at the administrative hearing.

[28] See, for example, *Keeshin Charter Service*, 250 NLRB 780 (1980).

[29] See *DeJana Industries*, 305 NLRB 845 (1991) (reinstatement with backpay awarded if employee could obtain license in a reasonable period of time).

[30] See, for example, *Precision Window Mfg.*, 303 NLRB 946 (1991).

[31] See, for example, *Viele & Sons, Inc.*, 227 NLRB 1940 (1977).

10529 Reinstatement Offers

10529.1 Overview: An employer's obligation to reinstate under provisions of a settlement agreement or Board order is met when it has made a valid reinstatement offer.

Note that employee rejection of a valid reinstatement offer not only ends employer reinstatement obligations, but also ends the backpay period. See Compliance Manual section 10530.2.

The following sections address issues concerning the validity of an employer reinstatement offer and employee obligations in accepting an offer.

10529.2 Validity of Offer: In general, reinstatement offers must be for full reinstatement to former conditions, or to conditions that would be in effect had there never been an unlawful action. Reinstatement offers that qualify full reinstatement in any way may not be valid, and thus may not serve to meet the reinstatement requirement of a settlement agreement or a Board order nor to end the backpay period.

To avoid misunderstanding, the compliance officer should advise employers to make offers of reinstatement in writing and should likewise advise discriminatees to respond in writing. Employers should be advised that they cannot rely on communicating a reinstatement offer through the compliance officer.

It is the responsibility of the compliance officer to investigate contentions that a reinstatement offer constitutes less than full reinstatement. This investigation will require review of established employer policies in relevant areas, such as seniority, transfer, and layoff. Determination of the validity of the offer will depend on applying the principle that the employee is to be reinstated to conditions that would exist in the absence of the unlawful action.

A discriminatee may refuse an inadequate offer of reinstatement without waiving the right to reinstatement.[32]

When the adequacy of the offer is disputed, and its determination is close or subject to compliance proceedings, the compliance officer should advise both the employer and the employee that a reinstatement ultimately found

[32] See, for example, *Holo-Krome Co.*, 302 NLRB 452, 454 (1991).

to be inadequate will not end the backpay period nor meet the employer's reinstatement obligation.

An offer ultimately found valid will have ended the backpay period, will have met the employer's reinstatement obligation even if rejected by the employee, and thus will not have to be made again by the employer at the time of the ultimate determination.

It may be appropriate to point out to the employee that it would be prudent to accept an offer pending disposition of a dispute over its validity. Ultimate disposition could include additional backpay, if reinstatement was at inadequate wages, or restoration of additional conditions.

10529.3 Reinstatement Offered Conditioned on Further Unfair Labor Practice Proceedings: An otherwise valid reinstatement offer that advises the employee that the employer is still asserting the lawfulness of its past action against the employee in pending unfair labor practice proceedings is valid. An otherwise valid reinstatement offer made without payment of backpay is also valid.[33] An employee who rejects such an offer will not be entitled to a future offer, and the backpay period will end.

When reinstatement offers are made with such conditions, unfair labor practice proceedings will continue, as will compliance proceedings to secure backpay through the end of the backpay period.

Note, however, that an offer that is conditioned on the employee withdrawing unfair labor practice charges or waiving backpay is not a valid offer.[34]

10529.4 Period for Acceptance of Offer: A valid reinstatement offer must give the employee a reasonable period to accept and report to work. There are no hard-and-fast deadlines for accepting a reinstatement offer, and what constitutes a reasonable period depends on the circumstances of both employer and employee.

During the period between the unlawful action and the reinstatement offer, an employee may obligate himself or herself to activities that cannot be terminated immediately. The employee must be given adequate time to

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[33] See, for example, *Consolidated Freightways*, 253 NLRB 988 (1981), on remand on other grounds 669 F.2d 790 (D.C. Cir. 1981), reported 290 NLRB 771 (1988), enfd. 892 F.2d 1052 (D.C. Cir. 1989).

[34] See, for example, *Adscon, Inc.*, 290 NLRB 501, 502 (1988).

disengage himself or herself before being required to accept reinstatement or abandon reinstatement rights.[35]

If an otherwise valid reinstatement offer states an unreasonable reporting date, the employee may still have an obligation to respond, and inquire as to the employer's flexibility concerning the actual return date. Failure to respond may toll the running of backpay.[36] A reinstatement offer may be invalid if it makes clear that it will lapse if the employee does not report by an unreasonable date.[37]

An employee may not require the employer to hold an offer of reinstatement open indefinitely.[38] In situations where the employee is not immediately available to accept a reinstatement offer, a determination of the reasonable period to apply should take into account the employer's established practices.

For example, if an employee is pregnant and near term at the time she is offered reinstatement, the amount of time until she is required to return to work should be consistent with the employer's established policies regarding maternity leave, as well as provisions of the Family and Medical Leave Act of 1993. Questions regarding the application of this Act should be directed to the Division of Operations Management.

The inability of an employee to accept a reinstatement offer because of illness does not relieve the employer of its reinstatement obligation.[39]

10529.5 Reinstatement Offered to an Employee Engaged in a Strike: If an employee who has been unlawfully terminated is participating in a strike at the time the employer offers him or her reinstatement, the employee is not required to abandon the strike in response to an offer of reinstatement. If the employee continues participating in the strike, however, his or her reinstatement rights become those of an employee participating in a strike. See Compliance Manual section 10527.4.

Note that a reinstatement offer to a striking employee should also end the backpay period. A new backpay period may begin after the striking employee makes an unconditional offer to return to work.

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[35] See, for example, *L.A. Water Treatment*, 263 NLRB 244, 246 (1982).
[36] See, for example, *Esterline Electronics Corp.*, 290 NLRB 834, 835 (1988).
[37] See, for example, *Toledo (5) Auto/Truck Plaza*, 300 NLRB 676 fn. 2 (1990).
[38] See, for example, *Tennessee-Carolina Transportation*, 108 NLRB 1369, 1371 (1954), remanded on other grounds 226 F.2d 743 (6th Cir. 1955).
[39] See, for example, *NLRB v. Mooney Aircraft*, 61 LRRM 2164, 2165–2166 (5th Cir. 1966), contempt proceeding on order in 138 NLRB 1331, 1333 (1962), enfd. 328 F.2d 426 (5th Cir. 1964).

10529.6 Employee in the Armed Forces: When an employee who is required to be reinstated is in the Armed Forces, the employer's offer of reinstatement should be in the form of a letter, with a copy to Regional Office, advising the employee that he or she is being offered full reinstatement to his or her former or substantially equivalent position upon notifying the employer of acceptance within 90 days after discharge from the service, or from hospitalization continuing after discharge for a period of not more than 1 year.

The 90-day period, or 1 year if hospitalized, is to provide the employee with the protection of the Veterans Reemployment Rights Statute, Title 38 U.S. Code, Chapter 43, sections 4321–4327.[40]

The compliance officer should inform the employee of the order as it applies to him or her and must instruct the employee to notify the Region as to his or her whereabouts. After discharge from the service or from hospitalization, and on timely notification thereof to the employer, the employee's right to reinstatement will be governed by general reinstatement principles.

10529.7 Missing Employees: If an employer makes a reasonable effort to communicate a reinstatement offer to an employee, but is unable to locate the employee, the backpay period may be suspended. See Compliance Manual section 10548.3. The failed effort does not end the employer's reinstatement obligation, however, and the Board may later require reinstatement as part of its order[41] or the employer may be required to offer reinstatement if the employer is later advised of the employee's availability for work.[42]

See Compliance Manual section 10646 regarding the extinguishment of remedial obligations to employees who remain missing after compliance is otherwise effectuated.

10529.8 Waiver or Rejection of Reinstatement Offer: If an employee declines a valid reinstatement offer, the employer's reinstatement obligation is ended. There is no obligation to make the offer again.

A valid reinstatement offer ends the backpay period, but does not meet the requirements of backpay provisions of a settlement agreement or Board

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[40] See, for example, *Diversified Case Co.*, 263 NLRB 873, 875 fn. 8 (1982).
[41] *Burnup & Sims, Inc.*, 256 NLRB 965 (1981).
[42] *Jay Co.*, 103 NLRB 1645 (1953).

order. That is, backpay must still be paid for the period between the unlawful action and the reinstatement offer.

Statements made by an employee during the course of unfair labor practice proceedings that purport to waive the right to reinstatement or to decline do not end the backpay period or serve to relieve the employer of its obligations under reinstatement provisions of a settlement agreement or Board order that results from the proceedings.[43]

[43] See, for example, *Heinrich Motors*, 166 NLRB 783, 785 (1967), enfd. 403 F.2d 145, 149 (2d Cir. 1968); *Lyman Steel Co.*, 246 NLRB 712, 714 (1979); and *Big Three Industrial Gas*, 263 NLRB 1189, 1203 (1982).